

20 January 2017

Luke Walton
Director, Environment and Building Policy
Department of Planning & Environment
GPO Box 39
SYDNEY NSW 2001

Dear Mr Walton,

Draft State Environmental Planning Policy (Coastal Management) 2016

Thank you for providing NSW Ports with the opportunity to provide feedback on the *draft State Environmental Planning Policy (Coastal Management) 2016* (draft CM SEPP). NSW Ports, in principle, supports the NSW Government's commitment to improve the way we manage the State's coastline. However, NSW Ports objects to the draft CM SEPP applying to ports including shipping channels and navigational areas for the following reasons:

- The objects of the *Coastal Management Act, 2016* (CM Act) do not acknowledge the importance of ports and commercial shipping within the coastal zone, and therefore prejudices the draft CM SEPP's ability to implement provisions which consider port developments. Therefore, the draft CM SEPP focuses on protecting the environmental assets of the State's coast. There is no requirement in the draft CM SEPP for developments in proximity to ports to consider potential impacts on commercial shipping or the port as a critical activity in the coastal zone.
- No justification has been provided as to why the mapped areas have been identified as environmental assets of the coast requiring protection. Taking a generic approach to mapping the "coastal environment area" and the "coastal use area" will only add additional costs to assessing developments along the State's coastline.
- The terminology used in the draft CM SEPP does not provide a consent authority with the ability to consider the merits of a development, that is consider the economic and social benefits of a development proposal while also considering environmental impacts and environmental offsets / benefits.
- Many of the development controls which are proposed for coastal management areas are overly restrictive and would prevent a balanced assessment of development proposals on their merit. Of particular concern are the clauses (e.g. clauses 14, 15 and 16) which require consent authorities to be satisfied that a development is not likely to cause adverse impacts on particular environmental aspects.

NSW Ports is of the opinion that the draft CM SEPP requires significant redrafting including amendments to the CM Act in order to address our concerns and hence requests that the

ports of Port Botany and Port Kembla are excluded from the application of the draft CM SEPP (specifically that land governed by *State Environmental Planning Policy (Three Ports) 2013*) including the associated shipping channels and navigational areas for these ports. Our justification for this request is outlined in further detail below.

Objectives and Aims of the coastal management legislation:

The objects of the CM Act do not acknowledge the importance of ports and commercial shipping within the coastal zone including their ongoing operation and development. The ports of NSW are economic assets of national significance, critical to the future economic growth and development of the State. NSW Ports is responsible for managing Port Botany and Port Kembla which are key import and export gateways for NSW. The fundamental purpose of these assets is to meet the trade needs of NSW, for the benefit of the people and businesses of the State.

The CM Act has identified “ports, shipping and harbours” within the definition of “essential infrastructure”. The only reference in the CM Act to “essential infrastructure” is under clause 7 which outlines provisions applicable to the “coastal vulnerability area”. Subclause (2) of clause 7 outlines the management objectives for the coastal vulnerability area which includes only one reference to essential infrastructure as follows:

(h) to prioritise actions that support the continued functionality of essential infrastructure during and immediately after a coastal hazard emergency,

Therefore, the CM Act only supports development works being undertaken at ports, shipping and harbours after a coastal hazard emergency. It does not support, and has not recognised, the importance of developing essential infrastructure along NSW’s coastline. Also, it is unclear whether Port Botany and Port Kembla are identified within the coastal vulnerability area given these areas have not been mapped as part of the maps exhibited with the draft CM SEPP.

It is our understanding that the draft CM SEPP is required to be consistent with the objectives of the CM Act. As stated above, the CM Act has not recognised the economic and social significance of ports and commercial shipping, including shipping channels and navigational areas, to the State. While the objectives of the CM Act includes “to recognise the coastal zone as a vital economic zone and to support sustainable coastal economies...”, it is unclear whether this was intended to capture commercial shipping and working ports. In any case, the draft CM SEPP does not include sufficient measures to achieve this objective.

The aims of the draft CM SEPP focus on the environmental protection of the State’s coast. NSW Ports is therefore also of the opinion that the draft CM SEPP does not recognise the importance of the State’s coastline to facilitate commercial shipping in order to meet the growing trade needs of NSW and the nation. The draft CM SEPP has not made allowance for the further development of major port infrastructure that could reasonably be undertaken subject to appropriate mitigation measures to address potential environmental impacts. With regard to clause 7(2) of the draft CM SEPP, the prevalence of the Three Ports SEPP would not be sufficient to address NSW Ports’ concerns.

Given the above, the objects of the CM Act and the aims of the draft CM SEPP would need to be amended and redrafted to ensure that the ports of NSW can continue to be developed and operated in a sustainable and efficient manner.

Mapping of the coastal environment and use areas:

The method used to map land in proximity to coastal wetlands and littoral rainforests, coastal environment areas and coastal use areas is both arbitrary and generic. It fails to consider the existing condition and use of land. The lack of sophistication in mapping these areas is likely to impose overly onerous requirements on some intensively developed areas (e.g. ports) while failing to protect more extensive features of the coastal environment.

Furthermore, the coastal environment and coastal use mapping appears to be based on outdated data regarding foreshore alignments, such that it does not take into consideration port reclamation works undertaken at Port Botany and Port Kembla within the last 10 years. As a result, significant portions of highly-developed, intensively used port land are mapped as coastal environment areas whereas large areas of relatively undisturbed beaches, headlands and native coastal vegetation in nearby areas, such as La Perouse, are not included.

The coastal wetlands mapped at Penrhyn Estuary and Tom Thumb Lagoon (i.e. adjacent to Port Botany and Port Kembla respectively) are worthy of protection, but this would be more appropriately achieved by including suitable provisions within the Three Ports SEPP. In this way the requirements for protection of coastal wetlands can be achieved in a manner that is consistent with the objectives of developing and operating major commercial ports for the benefit of the NSW economy.

Ports are highly engineered precincts to allow for the efficient movement of goods between land and sea. As such, port developments may involve, by necessity, impacts on the biophysical, hydrological and ecological environment which, although they may be mitigated to an acceptable degree, cannot be entirely avoided. It is therefore inappropriate to include port land in the coastal environment area.

The coastal use mapping does not incorporate the spatial extent of existing coastal uses, such as ports. The associated development controls for coastal use areas also do not include any protections for maritime-related uses such as ports, shipping, commercial fishing, commercial tourism or recreational fishing/boating.

Merit assessment of coastal developments:

The terminology used in the draft CM SEPP does not provide a consent authority with the ability to consider the merits of a development. That is, the draft CM SEPP does not allow the consent authority to consider the economic and social benefits of a development proposal while also considering the environmental impacts and environmental offsets / benefits of a development. The draft CM SEPP specifically states that a consent authority cannot grant development consent to a development in the coastal management area unless it is satisfied it "is not likely to cause adverse impacts on" aspects of the coastal zone. The CM SEPP does not require the consent authority to consider the social and economic consequences of not approving a development such as a port expansion required to cater for the growing trade needs of the State.

NSW Ports is concerned that the current drafting of the CM SEPP may result in port developments being refused or that they may be subject to lengthy and costly legal disputes. The interpretation of "likely to cause adverse impacts" is subjective and does not take into consideration the locality or the environment in which the development is being undertaken, the extent / size of the environmental impact, or any proposed mitigation measures or environmental offsets of the development.

While NSW Ports is generally supportive of the draft CM SEPP outlining the matters that require assessment in the coastal zone, NSW Ports is of the opinion that the *Environmental Planning and Assessment Act, 1979* (EP&A Act) and other commonwealth and state legislation, including environmental planning instruments and Secretary Environmental Assessment Requirements (SEARs), adequately specify the environmental assessment requirements for port developments.

Potential Implications for port developments:

To highlight the potential implications of the draft CM SEPP for future port developments, the findings of environmental impact assessments for recent port developments have been reviewed and hypothetically assessed against the development controls proposed under clauses 14 and 15 of the draft SEPP. Some examples of potential issues associated with the draft CM SEPP are presented below.

The Environmental Impact Statement (EIS) for the Port Botany Expansion, prepared by consultants URS on behalf of the then Sydney Ports Corporation in 2003, considered a broad range of potential environmental impacts associated with the expansion of container handling facilities at Port Botany.

- In relation to water quality impacts, the EIS stated that “The new terminal’s stormwater management system would minimise contaminated runoff discharging into Botany Bay.” The consultant arrived at this conclusion after considering the scale and nature of the development and the proposed mitigation measures to treat stormwater runoff prior to discharge. However, the consultant’s assessment would not be sufficient to satisfy the “not likely to have an adverse impact” test under clause 14(c) of the draft CM SEPP.
- In relation to terrestrial ecology, the EIS proposed protection and habitat enhancement measures to “compensate for potential impacts to shorebirds” associated with the development. Compensatory measures and environmental offsets are accepted as an important alternative for many major developments where it is not possible to avoid or reduce impacts on environmental values. However, the “not likely to have an adverse impact” test for native vegetation, fauna and their habitats under clause 14(d) of the draft CM SEPP would arguably preclude the option of compensatory measures.

At Port Kembla, similar findings were made in the Environmental Assessment (EA) for the Outer Harbour Development that was prepared by AECOM on behalf of the then Port Kembla Port Corporation.

- In relation to groundwater impacts, the EA stated that “the proposed reclamation area has the potential to impact on the groundwater flow regime” which would potentially contravene the requirement for no adverse impact on the hydrological environment surface and groundwater, as set out under clause 14(a) of the draft CM SEPP.
- Similarly, the EA identified that the development would inevitably have visual impacts, although these were “generally consistent with the surrounding environment.” Arguably such impacts would be inconsistent with clause 15(a)(iii) of the draft CM SEPP which requires no adverse impact on the visual amenity and scenic qualities of the coast.

Both the Port Botany Expansion and the Port Kembla Outer Harbour Development were considered to be acceptable because their potential environmental impacts would be mitigated by implementing appropriate controls and management practices. Such developments were also justified on the grounds of their contribution to the economic prosperity and social well-being of the State. The draft CM SEPP would not allow for consideration of these factors when determining development within the coastal zone resulting in a rigid and unbalanced approach to development assessment that would prevent many worthwhile projects from being approved.

While the Three Ports SEPP allows for many developments within ports to be undertaken as exempt or complying development, there are inevitably some gaps in its coverage that result in the requirement to obtain development consent. In such cases, the CM SEPP would apply resulting in additional assessment burdens for proponents to assess the impacts for minor port developments.

Other matters (DV):

NSW Ports is concerned with a number of other provisions within the draft CM SEPP. These matters are outlined below:

- **Public authority:** NSW Ports is only defined as a “public authority” for the purposes of *State Environmental Planning Policy (Three Ports) 2013* (Three Ports SEPP) (refer to clause 277(3) of the *Environmental Planning and Assessment Regulation, 2000* (EP&A Regulation)). Therefore, NSW Ports would need to obtain development consent for coastal protection works under clause 21(1) of the draft CM SEPP, given NSW Ports is not deemed a public authority under the EP&A Regulation for the draft CM SEPP, which is unacceptable.
- **Coastal Protection Works:** Storm events in mid-2016 caused damage to seawalls, revetments and breakwaters at Port Kembla. The repair works commenced shortly after the storm event and are still being carried out in the Port precinct by both NSW Ports and its tenants as exempt development under the Three Ports SEPP. Clause 21(1) of the draft CM SEPP would require NSW Ports and its tenants to obtain development consent for such work because it is more specifically defined under the draft CM SEPP as requiring consent. This is not practical within a working port environment and could impact on the safe operation of the port.
- **Designated development:** Clause 11(2) states that any development that requires consent under clause 11(1) of the draft CM SEPP is declared to be designated development for the purposes of the EP&A Act. This includes any development, by virtue of clause 11(1)(d), “on land wholly or partly identified as coastal wetlands”. We are concerned that developments which are currently identified as being as exempt, complying or development without consent would be deemed to be designated development. For example, this could include subdivision of land, maintenance works, installation of fenders, or a change use of development which are all currently exempt development under the Three Ports SEPP. We note that clause 24(3)(c) of the Three Ports SEPP does not permit development to be carried out as “exempt development” if it is specified as “designated development”. The application of the draft CM SEPP to the Three Ports SEPP land only creates confusion in regards to planning approval pathways. The Three Ports SEPP was specifically drafted to apply to port land and therefore any additional assessment requirements should be captured within the Three Ports SEPP.

- **Interpretation of "land":** It is NSW Ports' understanding that a reference to "land that is wholly or partly" within a coastal management area is to be interpreted to include the whole allotment of the parcel of land rather than the mapped area / zone. For example, a wetland may include the same lot and deposited plan reference number as the seabed of a bay or the sea and hence clauses 11 and 12 of the draft CM SEPP could be triggered. The same issue applies for clauses 13 to 15. This places unnecessary assessment processes in place for large parcels of land such as water land where a development activity may be occurring a significant distance away from the mapped area / shaded areas.
- **Hierarchy of development controls:** The hierarchy of development controls proposed in clause 19 of the draft CM SEPP would further bias the assessment and determination of coastal development in favour of environmental protection at the expense of economic and social benefits. Such an unbalanced approach to development control is unnecessary and would deny consent authorities the opportunity to assess and determine developments on merit in the public interest.
- **Additional consultation:** Schedule 3 of the draft CM SEPP also proposes to amend the consultation requirements of *State Environmental Planning Policy (Infrastructure) 2007 (ISEPP)*. NSW Ports is of the opinion that the existing consultation provisions under clause ISEPP are adequate for the port precinct. NSW Ports does not support amendment [2] to the ISEPP.

NSW Ports appreciated the opportunity to discuss our initial concerns with the Department of Planning and Environment regarding the draft CM SEPP on 21 December 2016. Should you wish to discuss the above matters further, please do not hesitate to contact me on PH: 9316 1131 or via email daniela.vujic@nswports.com.au.

Yours sincerely,



Daniela Vujic
Planning Manager